

No. 12484

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN AUTOMOBILE INSURANCE COMPANY AND
AMERICAN AUTOMOBILE FIRE INSURANCE COMPANY,
Appellants,

vs.

AMERICAN AUTO CLUB,

Appellee.

Brief of Appellants, American Automobile Insurance
Company and American Automobile Fire Insur-
ance Company.

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Specification of Errors.

I.

The Court erred in finding that the words "American Auto" have acquired no secondary meaning in the field of automobile insurance [Finding XI, Tr. 24-25], as the undisputed evidence shows the contrary, said finding being without evidentiary support.

II.

The Court erred in finding, expressly or impliedly, that the name "American Auto" and its secondary meaning, if any, have been abandoned by appellants [Findings V and VI; Tr. 22-23] because the evidence conclusively shows the contrary, said findings being without evidentiary support.

III.

The Court adopted an erroneous rationale in mistakenly assuming that no secondary meaning can attach to words which are not unique, and that a secondary meaning, to be protected, must be known to a substantial portion of the general public rather than merely to those with whom petitioners come in contact.

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Brief of Appellants, American Automobile Insurance
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ance Company.

Jurisdictional Facts.

Jurisdiction in this case is based upon diversity of citizenship and an amount in controversy in excess of \$3,000.00 [Complaint, par. I, Tr. 2; Findings I, II, Tr. 20]. The value of appellants' business with which they seek to avoid unfair competition, was established by a premium income in 1947 of \$35,000,000.00 [Tr. 53]. The applicable statute is Title 28, U. S. Code, Section 1332 and Section 1921. Jurisdiction is found in Findings I and II [Tr. 20].

Statement of Facts.

The issues are stated on a prefatory page. In this action the plaintiffs, American Automobile Insurance Company and American Automobile Fire Insurance Company, referred to herein as appellants, and known as "American Auto," seek to enjoin respondent's proposed entry into the automobile insurance and service field as "American Auto Club."

Appellant American Automobile Insurance Company was incorporated in 1911 and started to operate in 1912 [Tr. 21]. It writes chiefly automobile insurance, but also Workmen's Compensation, general liability, burglary and plate glass insurance [Tr. 54]. Its premium income for the year 1947, the latest year for which records were complete at the time of the trial, was \$30,000,000.00 [Tr. 53]. Today its business is conducted in all of the forty-eight states [Tr. 53]. Its branch office in Los Angeles where respondent proposes to operate was opened in 1912 and has outstanding approximately 40,000 policies [Tr. 56]. The American Automobile Fire Insurance Company was incorporated in 1927 [Tr. 52] and since then has been doing business in all of the states writing principally fire, collision and inland marine insurance [Tr. 52-54]. The premium income for that appellant in 1947 was five or six million dollars [Tr. 53].

In 1943 appellants purchased the Associated Indemnity Company, a writer of Workmen's Compensation and general liability insurance, and the Associated Fire and Marine Insurance Company [Tr. 54]. Appellant American

Automobile Insurance Company is the parent corporation of all, paying the salaries of the employees of all four companies [Tr. 84].

The Court has found, as an undisputed fact, that appellants “are reputable and well regarded by other persons, firms and corporations engaged in the insurance business” [Tr. 21]. They have some two hundred agents and thirty-five claim adjusters in Southern California [Tr. 82-83]. Forty thousand policies are in effect in the Los Angeles area [Tr. 56] and in 1947 the sum of \$1,474,340 was paid in settlement of claims in Southern California alone, to approximately 23,258 persons [Tr. 172, 179].

It was undisputed that appellants are known as “American Auto” and that no other person, firm or corporation in the automobile insurance or service field is known as “American Auto” or “American Automobile” or has either combination of words or any similar thereto in its name [Tr. 110-111, 118, 137, 142, 149, 150, 156, 158, 231]. Gilbert R. Schwarz, called by respondent, testified on cross-examination that when he hears “American Auto” he thinks of appellants [Tr. 231, 230]. Another witness called by respondent, Joseph D. Thomas, testified that no other insurance organization is known as “American Auto” or has those words or “American Automobile” as part of its name [Tr. 213-216]. He also produced a printed list of such organizations licensed in California proving this to be true [Ex. I, Tr. 203, 204-205]. It was not suggested by any witness that the words “American Auto” do not refer to these appellants nor that they refer

to anyone else. It is the contention of appellants that the words "American Auto," when used in the automobile insurance and service field, have acquired a secondary meaning referring to them [Comp. par VII, Tr. 4-5].

Appellants advertised extensively for many years as "American Auto" [Tr. 58-59]. This advertising was partly in newspapers but mostly by means of pamphlets distributed by their brokers and agents to the public. Many samples of this advertising material are in evidence as exhibits. Since the exhibits are in San Francisco as this is written they cannot be accurately described but are easily identified.

Between 1944 and the time of the trial appellants had discovered that the loss ratio on automobile liability insurance had become so high as to make that line unprofitable and in that period had done no advertising direct to the public [Tr. 173]. This is a temporary and not a permanent policy [Tr. 173].

Certain "institutional advertising" had been done in that period in insurance journals and trade papers as "American Associated Insurance Companies" [Tr. 85-87]. The trial court impliedly, if not expressly, found that appellants have abandoned the name "American Auto" [Finding VI, Tr. 22-23]. The evidence shows that, at appellants' request and expense, they were listed in the yellow, classified section of the Los Angeles telephone directory, in bold black type and in box form as "American Auto Insurance Co.," the box containing an advertisement [Tr. 198-199; Exs. 12, 13]. (Appellants are also listed in the

Los Angeles white directories as “American Auto Ins. Co.” as well as “American Associated Ins. Co.” [Tr. 78], although it appears that the regular white directory listing is dictated by the telephone company [Tr. 196-198].) In the yellow classified directory only the name “American Auto Ins. Co.” is in the prominent form specially ordered and paid for. “American Associated” appears in the regular form determined by the telephone company and furnished without cost [Ex. 12, Tr. 198]. Appellant’s vice-president testified that there has never been an intent to abandon the name “American Auto” [Tr. 75-76] and at all times appellants have advertised themselves in the classified directories as “American Auto.” It was undisputed that the name “American Auto” has continued as an appellation designating appellants throughout and since the consolidation with the Associated Indemnity Company [Tr. 110, 119, 125, 141, 231]. The last of these transcript references is to the testimony of Gilbert R. Schwarz, respondent’s witness, who testified to the current usage as of the time of trial.

Respondent has not yet commenced operations [Tr. 40].

It was organized in the summer of 1947 [Tr. 40]. It has no members [Tr. 51]. It is incorporated, *inter alios*, to act as insurance agents and brokers in obtaining, selling, and writing insurance of all kinds, including automobile insurance, and to furnish claim adjustment service in connection with automobile insurance [Tr. 38-39]. Its proposed prospectus so provides [Tr. 39]. In its original answer it admitted, by means of an express statement, that

it “proposes to enter the automobile insurance business and to sell, under the name of American Auto Club, various types of automobile insurance policies” [Tr. 245]. This answer was signed and verified by respondent’s president [Tr. 245]. This admission was omitted from respondent’s amended answer and respondent’s counsel testified that the admission was a mistake of his own [Tr. 248-253]. Respondent’s president further testified in his deposition, however, that he had intended approaching these appellants for a discount in the sale of this insurance respondent proposed to sell [Tr. 244], but this testimony was somewhat vaguely evaded by the witness at the trial [Tr. 244]. The organizers and stockholders of respondent operate, under another name, an insurance agency and brokerage business [Tr. 47] and respondent’s president testified at the trial that otherwise unspecified applications for insurance would be referred by respondent to his own agency and brokerage firm [Tr. 47, 244]. It is admitted that respondent will furnish claim adjustment service in its own name, and that it will sell insurance at least through the aforementioned agency and brokerage firm of practically identical composition.

Respondent intends to placard the cars of its members with emblems bearing the words “American Auto Club” [Ex. 1, Tr. 41-42].

As soon as appellants learned of respondent’s existence, they protested to respondent in writing against the use of the name “American Auto” [Complaint, par. IX, Tr. 5; admitted by answer, par. IX, Tr. 11].

ARGUMENT.

I.

The Evidence Conclusively Establishes That the Words "American Auto" Have Acquired a Secondary Meaning.

On the foregoing record, establishing the facts without dispute, the trial court declared that the words "American Auto" have not acquired a secondary meaning [Finding XI, Tr. 24-25]. We respectfully submit that the evidence establishes the contrary without dispute and conclusively. Each and every witness who was called to testify on the subject stated that the words "American Auto" connote, in the insurance field, these plaintiff appellants and no other firm, company or person. This was not only established by the testimony of the numerous witnesses called by appellants but by respondents also. Gilbert R. Schwarz, called by respondent, testified that when he hears "American Auto" he thinks of appellants [Tr. 231, 230]. Joseph D. Thomas, also called by respondent, testified that no other insurance organization is known as "American Auto," or has those words or "American Automobile" as part of its name [Tr. 213-216]. This witness produced, on behalf of respondent, a printed list of such organizations authorized to do business anywhere in the State, further proving this fact [Ex. I, Tr. 203]. A list of persons and companies licensed as agents or brokers in California was likewise introduced by respondent and proves the basic fact [Ex. J, Tr. 204-205]. It was conclusively proved, by oral and documentary evidence, not only that appellants are commonly known as "American Auto," but also that no other person, firm or corporation in the automobile insurance or service field is so known [Tr. 110-111, 118, 137, 142, 149, 150, 156, 158, 231].

Instead of attempting to prove the contrary, respondent's witnesses, upon cross-examination, confirmed the fact which stands uncontradicted.

It may well be asked what more an *insurance company* could do, to invest a nickname with a secondary meaning, than to have it understood, when the name is used, that it is referred to?

As shown in the Statement of Facts the appellants have been doing business in Los Angeles since 1912 and in every state in the Union during most of that time. In the year 1947, the last year for which complete records were available at the time of the trial, appellants' combined premium income was over \$35,000,000 [Tr. 80]; in the Los Angeles area alone there were 40,000 policies outstanding [Tr. 56]; in that year alone and *in Southern California alone* the sum of \$1,474,340 was paid out in claims to 23,258 persons [Tr. 172, 179]. It is perfectly obvious that these plaintiff companies, while not attempting to compete with Coca-Cola or other popular commodities, are of necessity known to a large number of people to whom, in connection with insurance, the words "American Auto" can refer to no one else.

One basic fallacy of the Court's reasoning was revealed in the oral decision (Sec. VII, *post*, this brief) but there is reason to believe that decision that the words "American Auto" have acquired no secondary meaning is further attributable to the mistaken belief that no such secondary meaning can be acquired unless the public *in general* is aware thereof, *i. e.*, that the product is notorious. Finding XI [Tr. 24-25], referred to above, appears to reveal this mistaken concept, the Court finding that "plaintiffs are not and neither of them is known to the *public* as 'American Auto' and the name 'American Auto' is not understood to be nor is it identified with plaintiffs or either of them

widely, commonly, publicly or generally: . . .” (Emphasis added.) It is perfectly obvious that the plaintiffs, either by their true names or by the established nickname, must of necessity be known to a large number of people in the only section of the public in which they can be interested, *i. e.*, those who have had occasion, or may have occasion, to deal with them. The Court has found, on evidence which is undisputed and as to which no attempted contradiction was made, that plaintiffs are “reputable and well-regarded” [Finding IV, Tr. 21]. Appellants genuinely pride themselves in observing an enlightened claim policy as well as a policy of good service to its policy holders [Tr. 81-83]. As is admitted respondent intends not only to operate an automobile service organization (including service regarding claims and the sale of insurance, as discussed hereinafter), but to *placard its members’ cars with emblems bearing the words “American Auto.”* Clearly the opportunity for confusion is thus magnified to an unusual degree. Persons involved in accidents with cars so emblemized are likely, in numbers which cannot be exactly calculated, to conclude that they have claims against the assureds of these plaintiff companies and to attribute to the plaintiffs the treatment they receive. As stated by plaintiffs’ chief switchboard operator numerous calls, averaging four or five per day, are received by plaintiffs for persons wishing to contact the American Automobile Association (listed in the Los Angeles telephone directory as “American Auto Assn. Agcy”), a non-competitive organization [Tr. 161-162], referred to hereinafter (Sec. VI this brief).

It is obvious, to say the least, that of the thousands of persons who know appellants as “American Auto” there will be many who will reasonably assume that “American Auto Club” is a club affiliated with appellants,

The idea that a business which does not deal with the *whole* public, and therefore is not notorious may not protect its name as to those who do come in contact with it is, we respectfully submit, erroneous and contrary to the solidly established law. An automobile insurance company, like appellants, is entitled to such protection despite the limitation of its clientele. (*Aetna Casualty etc. v. Aetna Auto Finance*, 123 F. 2d 582.) The undisputed record of these appellants, showing their extremely sizeable operations in a field in which the words "American Auto" mean them and no one else, the large number of people with whom it is clear they must come in contact both as policy holders, claimants, and prospective purchasers of insurance, make it obvious that they have something of value to protect.

It also appears that the trial court was under the mistaken impression that the words "American" and "Auto" or "Automobile," being common and generic terms, are incapable of acquiring a secondary meaning [see Finding VIII, Tr. 22-23]. In a California decision decided in 1932, before the doctrine of secondary meaning had appeared anywhere in the California reports, and one in which that doctrine was not invoked or referred to, it was held that the words "American Automobile" are incapable of acquiring a secondary meaning because of their generic character. This case is *American Automobile Association v. American Automobile Owners Association*, 216 Cal. 125, 13 P. 2d 707. In that case neither the Court nor counsel were mindful of the existence of the secondary meaning doctrine, as is obvious from the opinion and from the subsequent emphatic statements to the contrary by the same Court in later cases. It is stated that no rights of any kind can be acquired by anyone in the words "American Automobile" or in any other common words. There

is no mention in the entire opinion of the secondary meaning doctrine nor to any principle akin to it; the Court discusses and applies decisions in which petitioners had asserted exclusive property rights, *technical trade-mark cases*, in which the rule actually is as stated by the Court. It was not suggested by the petitioner's counsel that the plaintiff had acquired any right to enjoin the use of a similar name by having imparted to the words a secondary meaning identifying them with itself.

It is obvious that the Court did not intend to abolish the secondary meaning doctrine, of which it was plainly not yet mindful. Had it had such an intent the case would now be overruled by its subsequent decisions altogether inconsistent with it when the secondary meaning doctrine has been the basis of suit. It is now held in California that the commonest words may become invested with a protectible secondary meaning.

The above case was decided in 1932. In 1933 it was followed in a factually weak case (*Fidelity Appraisal Company v. Federal Appraisal Company*, 217 Cal. 307, 18 P. 2d 950). Since 1933, it is interesting to note what has happened to *American v. American*, *supra*. It has been "explained," "distinguished" and ignored repeatedly *but it has never been followed*. (See *Rosenthal v. Brasley*, 19 Cal. App. 2d 257, at p. 260, 64 P. 2d 1109; *Milani v. Smith*, 85 Cal. App. 2d 163, 192 P. 2d 830; *Hoyt Heater Co. v. Hoyt*, 68 Cal. App. 2d 523, at p. 528, 157 P. 2d 657; *Brown v. Hook*, 79 Cal. App. 2d 781, at p. 797, 180 P. 2d 982; *Rosenthal v. Brasley, etc.*, 19 Cal. App. 2d 193, 64 P. 2d 1109; *Martin I. Rokeach, etc. v. Kubetz*, 10 Cal. App. 2d 537, at p. 541, 52 P. 2d 567; *The Carolina Pines v. The Catalina Pines*, 128 Cal. App. 84, 16 P. 2d 781.) The only actual distinction between *American v. American*,

supra, and the later cases is the obvious one that the secondary meaning doctrine was not thought of, presented or mentioned. The supposed distinctions made in the later cases in support of opposite conclusions are as illuminating of that fact as the one made in *Brown v. Hook, supra*, at p. 797, 18 P. 2d 982, 991:

“It is true that ‘Machinists’ Union No. 68’ consists of generic terms, and that generally the courts will not enjoin the use of a name consisting solely of generic terms (*American Automobile Assn. v. American Automobile Owners Assn.*, 126 Cal. 125) but where its use would be confusing and misleading the rule is different.”

The California Supreme Court denied a hearing in the last cited case on July 20, 1947. The California Supreme Court’s own later statement that *American v. American* does not apply when the secondary meaning doctrine is relied on is quoted below.

We respectfully submit that it may no longer be denied that the name “American Auto” may be invested with a secondary meaning which courts of equity will protect. Decisions are so numerous that it would be impossible to discuss them all in a brief of any reasonable length. We will therefore call attention to a number of representative decisions from both Federal and State Courts. The case of

Acme Chemical Co. v. Dobkin, 68 Fed. Supp. 601, contains the results of an exhaustive research reviewing decisions up to the year 1946. Forty-five decisions bearing closely upon the present case are cited and discussed. Among other pertinent observations the Court expresses

a basic thought which, we respectfully submit, should be compelling in cases of this kind:

“There is an important distinction between a corporate name and an individual name in respect to the manner of their acquisition. The corporation acquires its name by choice and *need not select a name identical with or similar to one already appropriated by a senior corporation* while an individual’s name is thrust upon him.” (P. 606; emphasis added.)

This same principle finds expression in a great number of decisions. In

British American Tobacco Co. v. British-American Cigar Stores Co., 211 Fed. 933,

the Court says (p. 935):

“To change the defendant’s name can injure no one, to retain it may mislead the public, confuse the trade and seriously injure the complainant’s business. *When such an alternative presents itself, the duty of a court of equity is plain, viz., to stop the unfair proceeding in limine. . . . If the defendant intends to deal fairly, it can do no harm to change its name; if it intends to use the name unfairly, it should be compelled to change it.*” (Emphasis added.)

This defendant has not yet begun to use this similar and confusing name. There can be no compelling (and *bona fide*) reason for the defendant to insist upon the use of a name so similar to that of an established operator, that confusion may result. The Court in the *Acme* case, *supra*, goes so far in support of this equitable principle as to state that “*unless the junior business which is conducted under a name similar or the same as the senior business, is so formed and distinctly removed as to create absolute in-*

surance against the public confusing the two, it is unlawful.” It is not necessary to go so far in order to afford these appellants the relief sought, but it is clear that the opportunity and therefore the duty to avoid confusion belongs to the respondent as the late arrival in the field. It has a wide choice of names which can cause no confusion.

The entire opinion in *Acme Chemical Co. v. Dobkin*, *supra*, should be incorporated herein by reference, not as controlling authority in itself, but as a brief which this Court may accept with the confidence that it is the product of impartial research and one which conveniently epitomizes a great number of decisions of other courts involving the issues of this case.

To avoid prolonging this brief to inordinate lengths attention is respectfully directed to the *generic or geographical* terms which have been protected in the cases cited:

Popular name “Academy” and “Motion Picture Academy”, acquired by usage although not plaintiff’s actual name, protected against “Hollywood Motion Picture Academy”:

Academy of Motion Picture Arts and Sciences v. Benson, 15 Cal. 2d 685, 104 P. 2d 650.

“Aetna Auto” protected when acquired by usage and advertising, although not plaintiff’s actual name:

Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc., 123 F. 2d 582, 584.

“Jackman from California” protected against “Jackman of Hollywood”:

Jackman v. Mau, 78 Cal. App. 2d 234, 177 P. 2d 599.

“Family” protected:

Rosenthal v. Brasley-Krieger Shoe Company, 19
Cal. App. 2d 257, 64 P. 2d 1109.

“Carolina Pines” protected against “Catalina
Pines”:

The Carolina Pines, Inc. v. Catalina Pines, 128 Cal.
App. 84, 16 P. 2d 781.

Ninth Circuit—“Hudson Bay” protected by its
secondary meaning:

Phillips v. The Governor and Company of Adventurers of England Trading Into Hudson's Bay,
79 F. 2d 971, 973.

Ditto:

The Governor, etc., Hudson Bay Fur Co., 33 F.
2d 801.

“British-American” protected:

British-American Tobacco Co. v. British-American Cigar Stores Co., 211 Fed. 933, 935.

“Continental” protected:

Continental Distilling Sales Co. v. Brancato, 173
F. 2d 296.

“American Products” protected:

American Products Co., a Delaware corporation, v. American Products Co., a Michigan corporation, 42 F. 2d 488.

“American Clay” protected:

American Clay Manufacturing Co. v. American Clay Manufacturing Co. of New Jersey, 198 Pa.
189, 47 Atl. 936.

“Western Auto Supply” protected against “Western Auto Salvage”:

Western Auto Supply Co. v. Knox, 93 F. 2d 850.

“Acme” protected:

Acme Chemical Co. v. Dobkin, 68 Fed. Supp. 601.

“Great Atlantic & Pacific”, commonly known as “A. & P.” protected against “A. & P. Cleaners, etc.”:

Great Atlantic & Pacific Tea Co. v. A. & P. Cleaners & Dyers, 10 Fed. Supp. 450.

Indian Territory Oil & Gas Co. v. Indian Territory Illumination Oil Co., 95 F. 2d 711.

“Universal” protected:

Universal Credit Corporation v. Dearborn Universal Underwriters Credit Corp., 309 Mich. 608, 16 N. W. 2d 91.

“Boston Wafers” protected:

C. A. Briggs Co. v. National Wafer Co., 215 Mass. 100, 102 N. E. 87.

“United Drug” protected:

United Drug Co. v. Parodney, 24 F. 2d 577.

“German-American” protected:

German-American Button Co. v. A. Heymsfeld, Inc. (German-American Hand Crochet Button Works), 156 N. Y. Supp. 223.

“Fox”, in connection with fur business, protected against use by competitor to suggest proper name:

Fox Fur Co. v. Fox Fur Co., 59 Fed. Supp. 12.

“Philadelphia Trust” protected:

*Philadelphia Trust, Safe Deposit & Insurance Co.
v. Philadelphia Trust Co.*, 123 Fed. 534.

“High standard” protected where applied to paints
and varnishes:

Lowe Bros. v. Toledo Varnish Co., 168 Fed. 627.

“French” protected where applied to ice cream:

French Brothers Dairy Co. v. John Giacin, 12
Ohio Circuit Court (N. S.) 134.

“Overland” protected:

Akron-Overland Tire Co. v. Willys-Overland Co.,
273 Fed. 674.

The applicable authorities were epitomized by this Court
in the case of *Stork Restaurant v. Sahiti*, 166 F. 2d 348,
at page 361, as follows:

“This thought that a newcomer has an infinity of
other names to choose from without infringing upon
a senior appropriator runs through the decisions like
a leitmotiv.”

Respondent’s president testified that he desired the name
“American Auto” because the word “American” appeals
to him [Tr. 239-240]. However, when asked “Would your
desire for the word ‘American’ be satisfied with the name
‘American Motor Club’?” his answer was “No, sir.” [Tr.
247.]

The evidence that “American Auto”, in this field, means
appellants and no one else, is undisputed. The finding to the
contrary is without evidentiary support and is apparently
attributable to a mistaken belief that a petitioner’s product

must be in universal use before relief can be granted. It is solidly established, however, that a secondary meaning will be protected in equity to prevent confusion in any field. It would seem that such relief should be readily granted against a newcomer in the field, who has not yet commenced operations, in favor of long-established petitioners who have acted with extreme promptness.

II.

In Cases of This Kind a Reviewing Court Is as Favorably Situated as a Trial Court to Decide Whether Relief Should Be Granted.

Cases involving unfair competition through the use of similar names constitute one of the few categories in which an appellate court is as favorably situated as a trial court to determine whether confusion is likely to occur and whether relief should be granted. For this reason the decisions on this subject are replete with instances in which the higher courts have overruled conclusions of trial courts denying relief, and substituted their own final conclusions in lieu thereof. No research has been conducted for the purpose of compiling a special or complete list of such decisions but, of those consulted on other points, the following involve the substitution of the final conclusion of reviewing courts for those of the trial courts denying relief:

Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc., 123 F. 2d 582;

Stork Restaurant v. Sahiti, 166 F. 2d 349 (9th Cir.);

Lane Bryant, Inc. v. Maternity Lane, 173 F. 2d 599 (9th Cir.);

Little Tavern Shops v. Davis, 116 F. 2d 903;

San Francisco Assn., etc. v. Industrial Aid, etc., 152 F. 2d 532;

Peninsular Chemical Co. v. Levinson, 247 Fed. 658;

Vogue Co. v. Thompson-Hudson Co., 300 Fed. 509;

Aunt Jemima Mills Co. v. Rigney & Co., 247 Fed. 407;

Rosenberg Bros. & Co. v. Elliott, 7 F. 2d 962;

Greyhound Corp. v. Goberna, 128 F. 2d 806;

R. H. Macy & Co. v. Macy's Drug Store, Inc., 84 F. 2d 387;

Western Auto Supply Co. v. Knox, 93 F. 2d 850;

Florence Mfg. Co. v. J. C. Dowd & Co., 178 Fed. 72.

We respectfully submit that it is obvious that the respondent company, proposing to move into the automobile insurance and service field, to emblemize the cars of its members, and to come into juxtaposition with appellants' listing in the telephone directories, invites confusion. We respectfully submit that this is as obvious and inescapable as in any of the cases cited above which were decided as a matter of law.

III.

Evil Intent or Actual Confusion Need Not Be Proved.

It is well settled that an actual intent to deceive or to acquire an unfair advantage need not exist; the issue may be judged objectively.

Lane Bryant, Inc. v. Maternity Lane, 173 F. 2d 559, 564 (9th Cir.);

San Francisco Assn., etc. v. Industrial Aid, etc., 152 F. 2d 532;

Acme Chemical Co. v. Dobkin, 68 Fed. Supp. 601, 613 (6);

American Products Co., a Delaware corporation, v. American Products Co., a Michigan corporation, 42 F. 2d 488.

It is also unnecessary to prove that actual confusion has resulted. Manifestly it would be impossible to prove that actual confusion has resulted when the petitioners act promptly, as here, and seek to avoid the damage before it is done.

Universal Credit Corporation v. Dearborn Universal Underwriters Credit Corporation, 309 Mich. 608, 16 N. W. 2d 91 (1944);

Acme Chemical Co. v. Dobkin, 68 Fed. Supp. 601;

Fox Fur Co. v. Fox Fur Co., 59 Fed. Supp. 12, 15.

IV.

The Fact That Administrative Approval of the Name Is Granted Is Not Controlling.

It is admitted by the pleadings that as soon as appellants learned that respondent intended to do business under its present name they protested [Par. IX, Complaint, Tr. 5; admitted, par. IX, Answer, Tr. 11]. It was admitted by respondent's proprietor that it had not yet transacted business of any kind [Tr. 40, 41], and that it has no members [Tr. 51]. It was likewise established by the testimony of respondent's witness, a deputy in the office of the Insurance Commissioner, that at the time appellants discovered respondent's existence and protested to that department, the matter had left that department with the name already approved [Tr. 212-213].

The fact that articles of incorporation in an objectionable name are issued is not binding as "otherwise judicial review would be barred."

Universal etc. v. Dearborn Universal etc., 309 Mich. 608, 16 N. W. 2d 91, 95(4).

Furthermore, Section 310 of the Corporation Code of California provides:

"The use by a corporation of a name in violation of this section may be enjoined notwithstanding the filing of its articles by the Secretary of State."

The same section provides that the Secretary of State shall not file articles in a name

"which is likely to mislead the public or which is the same as, or resembles so closely as to tend to deceive, . . . (t)he name of a similar corporation which is authorized to transact business in this State."

These plaintiffs never had an opportunity to be heard either by the Insurance Commissioner or the Secretary of State.

V.

There Has Been No Abandonment of the Name
“American Auto” by These Appellants.

It appears from the findings that the Court, after having mistakenly concluded that no secondary meaning attached to the name in the first place, impliedly found that the use of the name has been abandoned by appellants. In Finding V [Tr. 22] it is declared that prior to 1944 appellants advertised in trade journals under their complete names and also as “American Auto.” It is also declared, in connection with various folders prepared by appellants for distribution to the public, that “these folders were not widely distributed among the public by said brokers or agents nor were any distributed to any substantial extent whatsoever.” While this comment is parenthetical at this point, it should be noted that this finding contains rather definite proof of the mistaken belief that the whole public, or a substantial part of the whole public, must be affected before a protectible secondary meaning may be acquired. A statement that these advertisements in the name of “American Auto” “were not widely distributed among the public” and that they were not distributed “to any substantial extent whatsoever,” is perfectly true if the public referred to is the whole vast American public, but it is completely untrue, and contrary to the evidence, when directed to that section of the public in which appellants are interested and as to which they are entitled to protection. Thus the evidence shows that these advertisements were distributed to appellants’ patrons through appellants’ agents [Tr. 132-133]. It is apparent, both in the declaration that no secondary meaning ever existed and in the statement that appellants’ advertising was “not widely distributed among the public,” that the decision of the trial court is based

upon the mistaken conceptions already discussed and those pointed out in VII, *post*.

We respectfully submit that the erroneous conclusion that no secondary meaning exists is sufficient to require a reversal of the judgment. The further finding that appellants had abandoned the name is likewise unsupported by any evidence whatsoever as will appear.

In Finding VI [Tr. 22-23] it is declared that appellants, since 1944, have advertised in trade journals as "American Associated" or "American Associated Insurance Companies," and that since 1944 there has been an effort by appellants to have their company so known rather than as "American Auto." The Court further declares that "since 1944 neither of plaintiffs has made an attempt nor indicated any desire to become known as or to identify themselves or either of them with the name 'American Auto'" [Tr. 23].

It is respectfully submitted that as appears below, there is no evidence whatsoever to support this conclusion of abandonment.

So far as we have been able to discover an abandonment of an established name has been found to have occurred in only one case (*Hanover-Star Milling Co. v. Metcalf*, 240 U. S. 403, p. 419, 60 L. Ed. 713, p. 720). In that case the petitioner had, for over thirty years before filing its petition, withdrawn all effort to sell the particular trade-marked product in the area in question, leading the Court to observe that "no greater evidence of abandonment by non-user of trade mark rights could reasonably be asked for."

In *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 45 L. Ed. 60, the Court states "acts tending to show an abandonment (are) insufficient unless they show an actual intent to abandon."

In *Greyhound Corporation v. Rothman*, 84 Fed. Supp. 233, affirmed in 175 F. 2d 893, it is stated that an abandonment “depends upon intention, express or implied, as evidenced by word or conduct.”

It is true that since 1944 appellants have advertised in trade journals as “American Associated” and “American Associated Insurance Companies” but other indisputable and documentary evidence conclusively proves that there has been no abandonment of the appellation, “American Auto.”

Pages from telephone directories from various large cities are in evidence and other pages are described in the record [Ex. C, Tr. 90-91; Ex. 13, Tr. 190-192]. In every instance it will be found that appellant American Automobile Insurance Company is listed, with varying abbreviations, as well as American Associated Insurance Companies. As this is written these exhibits are in San Francisco so that it has not been possible to make a fresh inspection of them. However, the record contains a full description of both the white and the yellow classified directories of the Los Angeles area. Respondent claims that its intention is to do business in that area only and therefore Los Angeles is the controlling area in this case. It was shown on cross-examination of an employee of the telephone company, called as a witness by respondent, that it is necessary for the subscriber to order and to pay for the kind of listing appellants employ in the Los Angeles classified directory, *i. e.*, listings *in bold black type and in box form*. This is the type of listing used by appellants [Tr. 198-199]. Respondent attempted to prove by this witness that the form of telephone directory listing is determined, routinely, by the telephone company, but this attempt backfired and the witness, as noted, testified that it

was necessary for appellant to request and to pay for such a listing [Tr. 198-199]. In the face of the finding that appellants, since 1944, have made an effort to be known as "American Associated," instead of "American Auto," and that they have made no "attempt *nor indicated any desire to become known as or to identify themselves or either of them with the name of 'American Auto,'*" the conduct of the appellants in presenting themselves to the public by means of this most direct approach, the telephone book, is extremely illuminating and is decisive. "American Associated," the name in favor of which appellants are supposed to have abandoned "American Auto" appears in the small regular type of the kind routinely used by the telephone company in the absence of special instructions, whereas "American Auto Insurance Co." appears in bold black capitals and in a box. The exact listing is "AMERICAN AUTO INSURANCE Co.," followed by a box containing the words "Automobile and General Casualty Insurance Day or Night call" followed by the address and telephone number of appellants [Tr. 76-77]. Following the box and in the type routinely used by the telephone company in the absence of special request appears "American Auto Insurance Co." just as "American Associated" appeared above the box. Exhibit 12 is a page from the Los Angeles yellow classified directory for 1947, which book was current at the time of respondent's organization [Tr. 198-199]. It is identical with the listing described above. It thus conclusively appears that in the very area in question appellants featured the allegedly abandoned name "American Auto" before any

thought of these proceedings could have been entertained and continuously to and beyond the time of respondent's organization, to and including the present time as may be ascertained from a reference to the now current Los Angeles classified directory. The allegedly favored name "American Associated" carries a routine listing only, and is not advertised or accentuated.

It further appeared that the telephone company had evidently intended to change the foregoing specially requested listing to "American Associated," but the records of the company were corrected by scratching out the word "Associated" and substituting the word "Auto" [Tr. 200].

In the face of this evidence of direct appeal to the public, we respectfully submit that it is impossible to arrive at a rational conclusion that the appellants have any intention whatsoever of abandoning the name acquired by such long usage. This is the most direct approach to the public. *Appellants expect to be looked for in the telephone directory by their patrons and any others who seek to reach them, as "American Auto," the name which they here seek to protect.* We respectfully submit that this is the strongest evidence both that the appellants are known as "American Auto," and that, far from desiring to abandon the name, they desire to continue to be so known. As already noted the evidence is undisputed and, had there been any dispute, this printed proof would strongly refute it. Before any law suit could have been contemplated appellants ordered and paid for classified telephone directory listings and advertising only in their commonly used

name. It is conclusively proved that no abandonment was ever intended and that none has occurred.

(Before leaving this subject it should be noted that the regular white Los Angeles telephone directory lists American Associated Ins. Co. and six entries below, "American Auto Ins. Co." [Tr. 78]. The white directory for the western section of the Los Angeles extended area, lists "American Auto Ins. Co." [Tr. 191]. The directory for the northwestern area does likewise [Tr. 191]. The other sectional directories were not referred to. There is no special classified directory for any of the outlying districts, the one received in evidence being applicable to the combined areas. The truth of the testimony of appellants' Vice-President that appellants have never intended to abandon the use of "American Auto" [Tr. 75] is indeed abundantly proved. We respectfully submit that it is an indisputable fact that there has been no abandonment of the name and that the finding of the Court to the contrary is plainly unsupported.)

Furthermore it should be noted that the advertising referred to as having been done since 1944 is of decidedly limited significance as evidence even tending to prove an abandonment. In recent years appellants found that automobile liability insurance produced high loss ratios so that no attempt was made to increase appellants' automobile insurance business [Tr. 173]. It is natural and consistent that under such circumstances appellants would not circularize any portion of the public with advertising of that line of insurance. This is not a case in which circulars, always printed in the name of American Auto, as shown

by the exhibits on file, have been changed to “American Associated” or to any other name. It is simply a situation in which no such advertising has been done in any name. This change in policy is not a permanent one, appellants’ vice-president stating “we will undoubtedly try to develop it in the future when the proper time arrives” [Tr. 173].

It should also be noted that appellants are still currently known as American Auto as shown by the testimony, already referred to, by every witness questioned on the subject. Respondent’s witness Schwarz testified that when he hears “American Auto” he thinks of these appellants [Tr. 231]. Neither he nor defendants’ witness Joseph D. Thomas knows of any other insurance organization so designated [Tr. 214]. No attempt was made to prove the contrary because such attempt would necessarily be futile as shown by the printed lists of companies in evidence.

We respectfully submit that there is no evidence whatsoever to support any finding that appellants have abandoned this nickname by which they still appear to all interested persons through the media of special, paid listing in classified directories, and by which, to the exclusion of all other parties, they are still known.

Lastly it should be noted that while respondent denied, for lack of information or belief, that appellants have become known as “American Auto” [Par. VIII of Answer, Tr. 11, denying Par. VII of Complaint, Tr. 4-5] it did not plead abandonment.

VI.

Respondent Intends to Compete With Appellants and Is Authorized to Do So, Although Competition Is Not Necessary to the Relief Sought.

It is well settled that no competition between the parties is necessary in order to justify the granting of an injunction against a newcomer who proposes to do business under a confusingly similar name. Decisions to this effect are extremely numerous:

Organization granting academy awards in motion picture industry enjoins dramatic school: *Academy etc. v. Benson*, 15 Cal. 2d 685. The Court says at page 689: "But we perceive no distinction which, as a matter of law, should be made because of the fact that the plaintiff and the defendant are engaged in non-competing businesses. In situations involving the use of proper surnames in non-competitive businesses it has been held that where confusion was shown as likely to result the relief should be accorded to complaining party."

Automobile insurance company enjoins automobile finance company from using its nickname, "Aetna Auto," in its title: *Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc.*, 123 F. 2d 582.

9th Cir.—*Phillips v. The Governor, etc.*, 79 F. 2d 971, page 974 (4).

Grocery company enjoins cleaners and dyers: *Great Atlantic & Pacific Tea Co. v. A. & P. Cleaners & Dyers*, 10 Fed. Supp. 450.

Automobile manufacturer enjoins concern retreading tires: *Akron-Overland Tire Co. v. Willys-Overland Co.*, 273 Fed. 674.

Manufacturer of automobiles enjoins seller of radio tubes: *Wall v. Rolls-Royce of America*, 4 F. 2d 333.

Manufacturer of locks, keys, hardware, enjoins manufacturer of flashlights and batteries: *Yale Electric Corp. v. Robertson*, 26 F. 2d 972.

Injunction where no competition because no overlapping of territories: *Western Auto Supply Co. v. Knox*, 93 F. 2d 850.

Grower and wholesale distributor of tobacco enjoins retail seller of cigarettes: *British-American Tobacco Co. Ltd. v. British-American Cigar Stores Co.*, 211 Fed. 933.

However, it is quite clear that the respondent, despite an evasive denial at the trial, does intend to compete with these appellants both in the sale or insurance and in the rendition of claims service.

To begin with respondent's Articles of Incorporation provide in part as follows, speaking of its authorized powers:

“(a) To act as insurance agents and brokers in obtaining, selling and writing insurance of all kinds, including liability insurance and automobile insurance.

“(b) To act as agents, attorneys in fact, brokers, adjusters for individuals, firms, associations or corporations and particularly those owning, operating, using and maintaining motor vehicles. . . .”

“To furnish, in connection with the ownership, operation, use or maintenance of motor vehicles (4) any or all of the following types of motor service as defined in the Insurance Code of California: . . .”

“* * * claim adjustment, license and insurance services.” [Tr. 38-39.]

The proposed Prospectus of respondent company provides in part as follows:

“Insurance Service. The club will assist members in obtaining through a qualified agent or broker insurance covering liability of or loss by such member resulting from injury or damage to personal property arising out of an accident involving the ownership, maintenance, operation or use of a motor vehicle.” [Tr. 39.]

The original answer filed by respondent contained the following admission:

“Answering paragraph IX, this defendant admits that it proposes to enter the automobile insurance business and to sell, under the name of American Auto Club, various types of automobile insurance policies.” [Tr. 245.]

This admission was omitted from respondent’s amended answer and respondent’s counsel testified that the alleged error was his [Tr. 248-253]. However, this admission was not a technical one consisting of a failure to deny, but was express, and the answer containing it was sworn to by respondent’s president, the same witness who attempted to deny the truth thereof at the trial [Tr. 254]. Furthermore, this same witness testified, in his deposition, that he intended to approach Mr. Sessions, appellants’ vice-president, to see if appellants would offer a “good enough discount for us to operate” [Tr. 244].

It was also shown that the witness, as a partner of “Muller Brothers,” is in the insurance business, being

licensed as agent for two insurance companies writing a general line of automobile insurance [Tr. 244]. The witness and his brother are the owners of the business known as "Muller Brothers" [Tr. 47]. The witness, his brother and his wife are the stockholders of respondent [Tr. 47]. The witness admitted that "Any reference of insurance would be referred to Muller Brothers" [Tr. 47], although he also stated that if another company was specified the member would be referred elsewhere [Tr. 48].

It is clear that respondent, authorized to transact an automobile insurance business, having issued a prospectus declaring that purpose, having originally admitted that intention under oath, having an identity of stockholders with an insurance brokerage firm to which it still admits an intention to refer applications for insurance, is proposing to enter into direct competition with these appellants on all fronts. The assumption that respondent's proprietors, in their capacity as insurance agents, qualifying as some of the "experts" referred to in Finding X, will jealously protect the rights of these appellants while at the receiving end of a telephone and otherwise in direct contact with persons believing themselves to be addressing appellants, is an assumption which cannot and must not be made in these proceedings. In the absence of this direct competition we respectfully submit that appellants are entitled to protection against the possible effects of a claim policy inimical to their own, and to the confusion inevitably resulting from the *placarding of automobiles on the public streets*, and are entitled to protection before

damage is done. In the face of actual competition we respectfully submit that the need for protection is multiplied.

(Parenthetical reference should be made to the American Automobile Association. It is the only other person, firm or corporation in any field related even to automobile service, which includes in its name the word "American Automobile" or any likeness thereof. It is established by uncontradictory evidence that the American Automobile Association issues no policies directly or indirectly, that it does not deal with the public directly at all, but only through member clubs with different names, and that it is never referred to as "American Auto" [Tr. 56-58, 109, 118, 127-128, 156, 158-159, 161, 213-214, 215-216]. The witness whose testimony is referred to in the last reference above [Tr. 213-216] was called by respondent. The American Automobile Association is referred to as "Three A's," "Triple A" and "A A A" [Tr. 72, 128]. It is not suggested by anyone that the American Automobile Association is either competitive, engaged in any similar field or that it is ever referred to as "American Auto" or "American Automobile." It is a parent organization affiliated with a large number of local automobile clubs, each one operating under a local name and not using the name American Automobile Association [Tr. 57].)

As already noted no witness suggested that "American Auto" refers to anyone other than these appellants and all admitted that "American Auto" signifies these appellants.

VII.

The Decisions Cited by the Trial Court Are Inapplicable.

After the parties had rested, arguments had been completed, and the case submitted, the trial court, in the oral decision, cited two decisions which manifestly played an important part in forming the Court's opinion [Tr. 260]. Unfortunately appellants being unaware that the Court considered such decisions to be in point (they not having been cited by respondent), were unable either to read the same or to comment upon them. That which purports to be a quotation from the opinion in one of these cases [Tr. 260] is not such but is a paraphrasing of part of the decision giving a misleading impression so that counsel, hearing such comment, could not possibly comprehend what the cases actually held.

These decisions, relied on by the Court, are *Selchow & Righter v. Western Printing and Lithographing Company*, 47 F. Supp. 322, and *Steem-Electric Corporation v. Herzfeld*, 118 F. 2d 122.

They are cases holding that one who has no exclusive right to the *name of a product*, and who can have none because the name is either the *true name of the article* or is *generally used*, cannot prevent competition unless the *product* is associated by the public with the *producer*.

The trial Court confused the references to "the public," made in the cited cases only in the connection stated above, with the thought that the public, *in general*, must be substantially affected before relief will be granted. Please note that after quoting from these decisions the Court stated [Tr. 261]: "As to the percentage of the

public that would be affected directly, even if they would be at all confused, it would be a very negligible percentage, in the opinion of the Court. It would be a slight percentage, at most." This statement is perfectly true if the entire public is considered. To qualify for equitable relief by such a standard a petitioner would have to be notorious. Clearly appellants, like anyone else seeking to avoid confusion with another, is interested in protecting itself with reference to that section of the public with which it comes in contact, whether the thousands with whom it, like these appellants, necessarily come in contact is a large or small percentage of the whole public.

A reference to the facts of these cases discloses their dissimilarity to the present case. In *Selchow etc. v. Western Printing etc., supra*, the plaintiff, a manufacturer of the game known as "Parcheesi," sought to enjoin the defendant from selling a game known as "Pachisi." First the Court found that the game of "Parcheesi" is a Hindu game, correctly known as "Pachisi," and declared that one who "first introduces a foreign game" may not, by slightly changing its name, prevent others from selling it under its true name (p. 325). (This is tantamount to saying that one could acquire no proprietary interest in the game of chess by calling it "chiss.") In view of the foregoing it was further expressly stated that the only basis upon which relief could have been granted was upon the theory of secondary meaning but that this theory could not prevail because the defendant had carefully adopted a dissimilar and distinguishing wrapping for his product, correctly named, and on which he used his own name. Denying the injunction the Court said:

"The plaintiff here has proved that buyers for large department stores and other like establishments

have for years associated the name 'Parcheesi' with the plaintiff company but that does not hold true as to the general public, for it is very evident that an ordinary customer, going into a store and asking for the game 'Parcheesi' has no information as to who might have manufactured and produced that game. Not one purchaser in a thousand would know or care whether Selchow & Righter Company was the manufacturer. The fact is that the public in general knows Parcheesi as a game and not as an article made by the plaintiff."

It is obvious that an insurance company, selling promises and service, produces no product which its patrons and others with whom it deals can know as a product disassociated from itself. It is impossible to conceive of a claim against American Auto, or of an insurance policy issued by American Auto, in terms apart from American Auto. A debt or a promise is nebulous and meaningless except when considered in terms of the debtor or promisor and it is most unfortunate that the trial court, unknown to counsel before the case was decided, perceived an analogy between such a case and the sale of a tangible product which, because of its own particular nature, was incapable of being the subject of a protectible interest. Even in the field of tangible products a petitioner will be protected if his product is associated with himself as the intangible "product" of these appellants must necessarily be.

In the other case cited, *Steem-Electric etc. v. Herzfeld, supra*, plaintiff, the manufacturer of an iron called "Steem-Electric," sought to enjoin defendant's use of the name "Steam-O-Matic" (p. 124). Aside from the fact

that the two names are not similar, the Court points out that many concerns had used the name "Steam-Electric" both before and after plaintiff's entry into the field, and that plaintiff could not, by changing one letter, acquire special rights in the commodity (p. 126).

The express holding of these cases is that a trade-name acquires a secondary meaning "if, in the minds of the public, it means the producer rather than the product" (p. 126), and not otherwise. Clearly the promises made by appellants, the service offered by it and the service rendered in the satisfaction of claims or the defense of actions, are associated with appellants as the "producers" of the "product," and the cases cited are not germane to any issue of the present case.

The basic misconception expressly revealed above takes form in Finding X [Tr. 24] wherein the Court declares that insurance brokers and agents are experts who will not be confused by the similarity of the names and will not confuse the identities of the parties. Before this fact, if it be a fact, can be of comfort to appellants it will be necessary to make two assumptions. The first is the naive one that all such experts, including respondent and its brokers and agents, will at all times act impartially and in good faith and will not capitalize upon any confusion which will result. The other assumption is that appellants contact the public only through brokers and agents. It is true that its policies are sold through brokers and agents but it is obviously in direct contact with thousands of persons, the number of paid claimants in 1947 in Southern California alone being 23,258, receiving the sum of \$1,474.34 [Tr. 172, 179]. *Furthermore it is clear*

that respondent's open and widespread proclamation of "American Auto Club," through the emblemization of its members' cars, will not be confined to "experts" and there will inevitably be persons to whom appellants are well known who will conclude, to say the least, that the "American Auto Club" is an affiliate of theirs.

It has been shown that four or five calls per day are received by appellants from persons wishing to contact the American Automobile Association [Tr. 161-2]. It cannot be assumed that respondent, inevitably receiving calls intended for these appellants, will discourage such confusion. The gist of this action is that the confusing use of a similar name places it beyond the power of appellants, in a degree which cannot be calculated to control its reputation as well as its patronage.

As stated above the foregoing decisions were not cited by respondent. Counsel for respondent did, however, cite the case of *Standard Accident Insurance Company v. Standard Surety & Casualty Company*, 53 F. 2d 119, a written decision of a trial court in the Southern District of New York [Tr. 120]. In that case the plaintiff Standard Accident Insurance Company attempted to enjoin the defendant Standard Surety & Casualty Company from using the word "Standard" in its name. The judge stated, among other things (no doubt upon the evidence before him in that case), that 95% of the public does not care with whom they carry casualty insurance and that the other 5% are insurance experts such as the insurance

managers of large industrial corporations who investigate the records and resources of companies applied to (p. 120). The judge also stated that he was favorably impressed by the defendant's president and believed that there was no danger of anything being done to increase the confusion (p. 120). It is also pointed out that the witnesses had disagreed as to whether the word "Standard" had become synonymous with plaintiff's name (p. 121). The defendant had, for nine years, been operating a fire insurance company as Standard Insurance Company of New York (p. 120). In the case at bar it is not disputed that "American Auto" refers to appellants; respondent has not commenced operations; "American Auto," while composed of generic words, is clearly more distinctive than the single word "Standard." Thus in *Aetna Casualty & Surety Company v. Aetna Auto Finance*, 123 F. 2d 582, the Court stated that while there may be many cases in which the single word "Aetna" standing alone would not be relieved against, the combination of "Aetna Auto," being completely suggestive of plaintiff (as a nickname), would be (p. 584). A decree denying an injunction was reversed. In the case at bar, were there no other circumstances, respondent's plan *to place emblems upon its members' cars* distinguishes *Standard Accident Insurance Company v. Standard Surety and Casualty Company*, *supra*, and makes it clear that *this is not a case in which appellants can obtain protection through the intervention of experts between itself and the public.*

Conclusion.

It is respectfully submitted that the evidence in this case is undisputed. The respondent, not having commenced its operations, is able to do business as "American Motor Club" or under a variety of other names which can cause no confusion. It is respectfully submitted that it is inequitable, as a matter of law, to deny relief in this case. As has been shown, this Court and reviewing courts in general have freely substituted their conclusions for those of trial courts in cases of this kind, on factual records no more clear, the proper conclusion to be drawn being as readily apparent to an appellate court as to a trial court. It is respectfully prayed that the judgment be reversed with directions to grant the injunction.

Respectfully submitted,

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